

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHELBY PROIE, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES
SERVICE, et al.,

Defendants.

CASE NO. C11-5955BHS

ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO INTERVENE

This matter comes before the Court on The Marine Exhibition Corporation d/b/a Miami Seaquarium's ("Seaquarium") motion to intervene (Dkt. 23). The Court has reviewed the briefs filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On November 17, 2011, Plaintiffs Shelby Proie, Karen Munro, Patricia Sykes, Animal Legal Defense Fund, and People for the Ethical Treatment of Animals, Inc. ("Plaintiffs") filed a complaint against the National Marine Fisheries Service ("NMFS"); Eric C. Schwaab, in his official capacity as Assistant Administrator for Fisheries of the National Marine Fisheries Service; and Rebecca M. Blank, in her official capacity as the Acting Secretary of the United States Department of Commerce ("Federal Defendants"). Dkt. 1. Plaintiffs challenge a decision by NMFS "to exclude from the listing of the Southern Resident killer whale population all captive members of that population and their progeny." *Id.*, ¶ 1. Specifically, on "November 18, 2005 NMFS issued a final rule

1 listing as endangered the Southern Resident killer whale population, which the agency
2 found to be a distinct population segment of orcas in danger of extinction.” *Id.*, ¶ 32.

3 However,

4 When NMFS made its final decision to list the Southern Resident killer
5 whale population as endangered, it excluded from the listing “[r]esident
6 killer whales placed in captivity prior to listing or their captive born
progeny.” 70 Fed. at 69912; 50 C.F.R. § 244.01(b).

7 *Id.*, ¶ 39.

8 Plaintiffs contend that one captive member of the Southern Resident killer whale
9 population, Lolita, “is confined [at the Seaquarium] to an inadequate tank, which is
10 smaller than the minimum regulatory requirements, is without sufficient space, without
11 any companions of her own species, and without sufficient shelter from the sun.” *Id.* ¶ 2.

12 On January 25, 2012, the Seaquarium filed a motion to intervene. Dkt. 23. On
13 February 6, 2012, Plaintiffs responded. Dkt. 32. On February 10, 2012, the Seaquarium
14 replied. Dkt. 33.

15 II. DISCUSSION

16 In this case, the Seaquarium argues that it should be granted intervention as a
17 matter of right or, if not of right, then permissive intervention. Dkt. 23. Plaintiffs counter
18 that the Seaquarium should not be allowed to intervene as a matter of right. Dkt. 32.
19 Plaintiffs do not object to permissive intervention subject to certain conditions. *Id.* The
20 Court will address each issue.

21 A. Intervention of Right

22 To intervene as a matter of right under Fed. R. Civ. P. 24(a)(2), the applicant must
23 claim
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25 an interest relating to the property or transaction which is the subject of the
26 action and [that] the applicant is so situated that the disposition of the action
27 may as a practical matter impair or impede the applicant’s ability to protect
28 that interest, unless the applicant’s interest is adequately represented by
existing parties.

1 In particular, the Ninth Circuit requires the applicant to demonstrate that four
2 circumstances exist: (1) the applicant has a significant protectable interest relating to the
3 property or transaction that is the subject of the action; (2) the disposition of the action
4 may, as a practical matter, impair or impede the applicant's ability to protect its interest;
5 (3) the application is timely; and (4) the existing parties may not adequately represent the
6 applicant's interest. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir.
7 2004). The party seeking to intervene bears the burden of showing that all the
8 requirements for intervention have been met. *Id.*

9 The parties disagree on the issue of whether NMFS will adequately represent the
10 Seaquarium's interest in this action. The burden of showing inadequacy of representation
11 is "minimal" and is satisfied if the applicant can demonstrate that representation of its
12 interests "may be" inadequate. *Citizens for Balanced Use v. Montana Wilderness Ass'n*,
13 647 F.3d 893, 898 (9th Cir. 2011). In evaluating adequacy of representation, the Court
14 must examine three factors:
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16 (1) whether the interest of a present party is such that it will undoubtedly
17 make all of a proposed intervenor's arguments; (2) whether the present
18 party is capable and willing to make such arguments; and (3) whether a
proposed intervenor would offer any necessary elements to the proceeding
that other parties would neglect.

19 *Id.* The "most important factor" in assessing the adequacy of representation is "how the
20 interest compares with the interests of existing parties." *Id.* If an applicant for
21 intervention and an existing party share the same ultimate objective, a presumption of
22 adequacy of representation arises. *Id.* To rebut the presumption, an applicant must make
23 a "compelling showing" of inadequacy of representation. *Id.* "There is also an
24 assumption of adequacy when the government is acting on behalf of a constituency that it
25 represents," which must be rebutted with a compelling showing. *Id.*

26 In this case, the Seaquarium argues that the "Federal Defendants do not share and
27 cannot adequately represent the Seaquarium's interests [in this action]." Dkt. 23 at 9.
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1 Plaintiff's sole cause of action is that the agency's decision to exclude captive members
2 of the species from protection was without explanation and was arbitrary and capricious.
3 NFMS and the Seaquarium share the same ultimate objective of persuading the Court that
4 the action was not arbitrary or capricious. Thus, a presumption of adequacy arises. The
5 Seaquarium has failed to rebut this presumption with any compelling showing. While it
6 is true that the Seaquarium may be impacted if the agency action is set aside, "how [the
7 Seaquarium] has humanely treated Lolita for over four decades" is wholly irrelevant to
8 the issue of whether NFMS complied with the Administrative Procedures Act during the
9 rule making process. In other words, even if NMFS fails to argue that Lolita is properly
10 cared for, NFMS will undoubtedly make every argument that its exclusion rule, 50 C.F.R.
11 § 244.01(b), was not arbitrary or capricious. Therefore, the Court denies the
12 Seaquarium's motion to intervene as a matter of right.

14 **B. Permissive Intervention**

15 An applicant who seeks permissive intervention must prove that it meets three
16 threshold requirements: (1) the applicant shares a common question of law or fact with
17 the main action; (2) the motion is timely; and (3) the court has an independent basis for
18 jurisdiction over the applicant's claims. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th
19 Cir. 1998).


20 In this case, permissive intervention is uncontested. Plaintiffs, however, do
21 request certain restrictions such as the Seaquarium not delay the proceeding and that the
22 Seaquarium be precluded from filing a motion to transfer venue. With regard to delay of
23 proceedings, the Court finds that there are other rules sufficient to control unnecessary
24 delay. With regard to the motion to transfer, a review of the motion shows that it is
25 primarily based on issues that are not present in this administrative review case. *See* Dkt.
26 25 at 9 ("In this case, the real battle is over Lolita's care and treatment in Miami.").
27 Based on the complaint, the "real battle" is whether the agency's action was arbitrary and
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1 capricious. *See* Dkt. 1, ¶¶ 42–44. Although it appears that the Seaquarium’s motion to
2 transfer is without merit because it is based on an issue outside of the complaint, the
3 Court is not persuaded that it must restrict the Seaquarium’s due process rights by
4 regulating the type of motions that it may file. Therefore, at this time, the Court declines
5 to impose restrictions on the Seaquarium’s permissive intervention.

6 **III. ORDER**

7 Therefore, it is hereby **ORDERED** that the Seaquarium’s motion to intervene
8 (Dkt. 23) is **GRANTED in part** and **DENIED in part** and the Seaquarium is entitled to
9 permissive intervention in this action. The Clerk shall note the Seaquarium’s motion to
10 transfer (Dkt. 25) and motion to dismiss (Dkt. 24) for consideration on the Court’s March
11 16, 2012 calendar.

12 DATED this 28th day of February, 2012.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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